IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No 150 of 2002
in
COMPANY PETITION No 94 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GUJARAT LEASE FINANCING LTD.

Versus

O.L. OF ARYAN FINEFAB LTD.

Appearance:

1. COMPANY APPLICATION No. 150 of 2002
MR SHALIN N MEHTA for Petitioner No. 1
OFFICIAL LIQUIDATOR for Respondent No. 1
NANAVATI ASSOCIATES for Respondent No. 2
SINGHI & CO for Respondent No. 3
SERVED BY RPAD - (N) for Respondent No. 4

CORAM : MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 07/04/2003

ORAL JUDGEMENT

In this application, it is prayed as under:-

(i) That the Official Liquidator attached to this Hon'ble High Court and who has taken over charge of all assets of the opponent -M/s. Aryan Finefab Limited be directed to hand over the possession of all equipments/machineries described in para 7 of the present application to the applicant forthwith as provided for in clause 9.2.1 of the Hire Purchase Agreements dated 21.7.1993 and 5.11.1996;

(ii) That the applicant herein be permitted in terms of clause 9.2.1 of the Hire Purchase Agreements dated 21.7.1993 and 5.11.1996 to repossess all the equipments/machineries leased to the opponent Company and for that purpose by itself, its servants or agents enter upon any land, buildings or premises where such equipment/machinery is situated or is reasonably believed by the applicant to be situated;

(iii) That the Official Liquidator attached to this Hon'ble High Court and in charge of all assets of M/s. Aryan Finefab Limited, be directed to pay to the applicant all costs, charges and expenses incurred by the applicant for retaking or repossession of the machineries/equipments described in para 7 of the present application.

2. The facts giving rise to the present application are that the applicant herein is a public limited company and the opponent- Company (in liquidation) had approached the applicant for obtaining finance for the purchase of plant and machinery required for manufacture of certain goods. The applicant acceded to the request of the opponent-Company and decided to provide machinery and/or equipments on hire purchase basis on the terms and conditions specified in that regard. Accordingly, an agreement of hire purchase was executed between the applicant and the opponent-Company on 21.7.1993 and an amount of Rs.63,00,000/- was sanctioned by the applicant to the opponent-Company under hire purchase facility. A second agreement of hire purchase was also executed between the parties on 5.11.1996 whereby an amount of Rs.30,96,000/- was sanctioned to the opponent-Company under the hire purchase facility.

2.1 Under the above mentioned two hire purchase

agreements, the equipments and/or machineries, described in detail in para 7 of the application, were made available to the opponent-Company and the opponent-Company was required to make payment periodically of the amounts, for which postdated cheques were given to the applicant-Company.

2.2 On 30.1.1997, the opponent-Company informed the applicant by a FAX message that two cheques dated 1.2.1997 for amounts of Rs.1,91,425/- and Rs.91,194/- may not be presented since the opponent-Company was short of finance on account of return of certain cheques deposited by it in its account. A similar request was made for two cheques of even amount dated 1.3.1997 vide FAX message dated 28.2.1997. Thereafter, two cheques for the same amount dated 1.4.1997 were dishonoured whereupon the opponent-Company informed the applicant-Company that since the Directors of the opponent-Company were out of India, some time was required for payment of these amounts.

2.3 After June, 1997 no payment as contemplated by the aforesaid two hire purchase agreements was made by the opponent-Company. The applicant-Company time and again informed the opponent-Company orally as well as in writing to make the payment of the amounts due but no payment was made. The applicant-Company gave a statutory notice dated 9.1.1998 under Section 138 of the Negotiable Instruments Act to the opponent-Company for dishonour of the cheques issued by the opponent-Company. As all the efforts to get payment failed, the applicant-Company addressed a statutory notice dated 6.4.1998 to the opponent-Company by Regd. Post A.D. under Section 434 of the Companies Act, 1956. In the said statutory notice, the applicant-Company had set out the details that on 31.3.1998 a sum of Rs.28,26,210/- was due and payable towards the principal amount and a sum of Rs.5,84,410/- was payable as late fee charges, besides the future recoverable amounts to the tune of Rs.31,45,805/-.

2.4 As there was no response, the applicant-Company issued notice dated 21.4.1998 terminating both the aforesaid hire purchase agreements on account of default in payment. After receipt of the notice of termination dated 21.4.1998, the opponent-Company paid an amount of Rs.2,00,000/- on 14.7.1998 and 28.7.1998 by cheque of Rs.1,00,000/- each drawn on Punjab National Bank. Thereafter, the opponent-Company has not paid any amount and, therefore, the applicant-Company was constrained to approach this Court by filing Company Petition No.198 of

1998 for winding up of the opponent-Company.

2.5 The applicant-Company had also filed Special Civil Suit No.299 of 1999 against the opponent-Company in the Court of Civil Judge (S.D.), Mahesana for repossession of the equipments and/or machineries leased to the opponent-Company and also for restraining the opponent-Company, its Directors, agents and servants from transferring, alienating, encumbering, parting with the possession, or dealing in any manner whatsoever the hired equipments and/or machineries lying at the factory premises of the opponent-Company on Plot No.1559/1/A, Vill. Raipur, Tal. Kadi, Dist. Mahesana.

2.6 On 24.4.2001, this Court passed an order for winding up of the opponent-Company in Company Petition No.198 of 1998 and a batch of other Company Petitions and Company Applications filed against the opponent-Company.

2.7 On 29.1.2002, Special Civil Suit No.299 of 1999 instituted by the applicant-Company was decreed by the Court of Civil Judge (S.D.), Mahesana. The opponent-Company was ordered to hand over, return and deliver the possession of the machineries and/or equipments given by the applicant-Company. The opponent-Company was also restrained by way of a permanent injunction from transferring, alienating, encumbering, using, parting with the possession, or in any manner dealing with the said machineries and/or equipments (described in para 7 of the present application).

2.8 The present application is filed for repossession of the machineries given to the opponent-Company under Section 446 of the Companies Act, 1956 as a winding up order qua the opponent has already been passed by this Court on 24.4.2001. The present application is filed relying upon various clauses of the hire purchase agreements whereby according to the applicant-Company equipments /machineries have remained absolute property of the applicant-Company being the owner, and the opponent-Company being the hirer has no right or interest in the same until the equipment stood purchased from the owner on payment of all hire purchase installments together with all other sums payable, if any, by the hirer to the owner under the provisions of the agreement. Mr Mehta, learned advocate for the applicant-Company invited the attention of the Court to paragraphs 19 and 20 of the application wherein various clauses relied upon by the applicant-Company are quoted.

3 This application is contested by the secured creditors, of which ICICI Banking Corporation Ltd. being opponent No.3 herein, represented by Mr Buch, contended that the present application is not worth entertaining and the same is required to be rejected on the ground that the machineries were of the absolute ownership of the opponent-Company and that the applicant will have to stand in queue of the unsecured creditors to get pro-rata amount from the properties of the opponent-Company if exceeds after the claims of the secured creditors are fully satisfied. Mr Buch also contended that the decree which is referred to, passed in Special Civil Suit No.299 of 1999 by the Court of Civil Judge (S.D.) Mahesana dated 29.1.2002 is of no avail because it is passed after the order of winding up which was passed on 24.4.2001. The applicant-Company ought to have joined the Official Liquidator as party defendant in the said suit after passing of the winding-up order.

3.1 Mr Buch in the alternative submitted that the agreement which is sought to be relied upon was not an agreement for "hire purchase" but was in fact a "lease" agreement, and that being so, the said agreement cannot be looked into as the documents are not executed on proper stamp fee, under the Bombay Stamp Act, 1958. Learned advocate submitted that the agreement being that of lease, the same was required to be executed on a stamp paper as provided in Entry No.30 of Schedule I of the said Act. The document is executed on insufficient stamp paper, the same cannot be looked into and no relief can be granted to the applicant relying on that document.

3.2 Mr Buch invited the attention of this Court to various paragraphs of the present application and also of the judgment of the learned Civil Judge (S.D.) Mahesana in Special Civil Suit No.299 of 1999 wherein the words/phrases "leased", "finance facility" and the "leased property" are used indiscriminately.

3.3 Mr Buch, learned advocate also relied upon the two Division Bench decisions of this Court in the matter between Virji Lavji Makwana vs. Rainbow Screen Shades, 1979 (20) GLR 352, and in the matter between Govindbhai Purshottamdas Patel and others vs. New Shorrock Mills, Nadiad, 1984 (1) - 25 (1) GLR 156 to contend that what is important to determine the nature of the document, is the intention of the parties and not the mere nomenclature given to a document.

4 Mr Mehta, learned advocate appearing for the applicant submitted that the document is a document for

hire purchase and that there being no specific entry for the document for agreement for hire purchase, the same will fall in Entry No.5 of Schedule I which provides for Agreement or Memorandum of an Agreement and that in that entry also, it will fall within clause (h) which is for the "residuary". It is submitted that Entry No.5 has various sub-clauses and in those sub-clauses various documents and agreements are described in specific, and clause (h) of the said Entry is for the documents which are not covered in specific. It is submitted that the present agreement i.e. document for hire purchase will fall within clause (h) and accordingly such document is required to be executed on a stamp fee of Rs.20/-. Mr Mehta relied upon the commentary and a judgment on Entry No.5 in the Indian Stamps Act, 1899. In the Indian Stamps Act, 1899, Article 5 pertains to Agreement or Memorandum of an Agreement wherein clause (e) is for the "residuary".

Under the head, "Agreement to hire - Hire and purchase agreement" there is discussion to the effect that:

> "An agreement to hire is chargeable under this Article, though it is in the form of an entry in the book of the owner of the hired machine. A hire and purchase agreement falls under this Article. It is an agreement to hire with an option to purchase to the hirer. It is not a conveyance, nor is it an agreement to purchase falling within Exemption (a) under this Article."

Mr Mehta submitted that the same analogy will apply and in light of that it should be held that the present document was required to be executed on a stamp paper of Rs.20/- as it falls under clause (h) of Entry No.5 of Schedule I of the Bombay Stamp Act, 1958.

5. Having perused the document of agreement, which is produced at Annexure "A Colly." in the present application, more particularly, the clauses which are referred to in paragraphs No.19 and 20 of the application, this Court has no doubt that the agreement is of hire purchase and the ownership of the machineries has not vested in the opponent-Company, as the opponent-Company has not paid all the installments of hire purchase and the amounts due and payable under the provisions of the agreement. That being so, the answer to the question as to whether on the date of the order of winding up, the equipments/machineries though lying in the premises of the opponent-Company, belonged or not to the opponent-company is in negative because on the

reading of various clauses of the document, it is clear that the property did not pass to the opponent-Company and, therefore, the equipments and machineries though lying in the premises of the opponent-Company, did not belong to the opponent-Company.

6. The contention that the decree was passed after the date of winding up does not warrant any consideration for the simple reason that the applicant-Company is not required to base its claim on the decree. However, the same can be taken note of for finding an additional support to the claim of the applicant-Company as even a Civil Court while considering the question in detail has come to the conclusion that the document was of "hire purchase" and that the ownership did not pass on to the opponent-Company. In light of the above, the contentions raised by Mr Buch for one of the secured creditors are devoid of merits and the same deserve to be rejected.

7. So far as contention regarding the execution of the document on insufficient stamp fee is concerned, the same also has no merit in view of the fact that Entry No.5 of Schedule I of the Bombay Stamp Act, 1958 is pari-materia to Article 5 of Indian Stamp Act, 1899. Clause (h) of Entry No.5, is a residuary clause as it reads, "if not otherwise provided for", meaning thereby, all documents which are not specifically provided for in clauses (a) to (g) and are of the nature of Agreement or Memorandum of an Agreement, will fall in clause (h) of Entry No.5 of Schedule I of the Bombay Stamp Act, 1958. On the other hand, entry No.30 of Schedule I of the Bombay Stamp Act, 1958 is for lease. As the document does not fall in the category of lease agreement, Entry No.30 of Schedule I will not be attracted and, therefore, the objection raised on account of insufficiency of the stamp fee on the document of agreement is rejected.

8. The submission of Mr Buch that the document is in the nature of lease document and not hire purchase agreement and that the same should be ascertained from the intention of the parties is without any merit because this principle is required to be resorted to when the document is ambiguous otherwise the principle of falling back on the intention of the parties has no application. In the present case, the document is clear, from the relevant clauses of the document, it is possible to ascertain, without any hesitation, that it was nothing else but a hire purchase agreement, and more particularly in view of clauses 6.6, 8.2 and 9.2.1 which are reproduced hereinbelow for the ready reference:-

"6.6 - As between the Owner and the Hirer and their respective successors in title the equipment shall remain personal property of and shall continue to be in the ownership of the Owner."

"8.2 - If Hirer shall duly perform and observe all the stipulations and conditions herein contained and on his part to observed and performed, shall duly pay to the Owner all hire charges payable during the term of hiring together with all other sums, if any payable by the Hirer to the Owner under the provisions of this Agreement, the Hirer may purchase the equipment from the Owner. Until the equipment shall have become the property of the Hirer under the provisions of this Agreement it shall remain the absolute property of the Owner and the Hirer shall have no right or interest in the same other than under this agreement."

"9.2.1 - The Owner shall, without any notice, be entitled to remove and repossess the equipment and for that purpose by itself, its servants or agents enter upon any land, buildings or premises where the equipment is situated or is reasonably believed by the Owner to be situated shall not be responsible for any damage which may be caused by any such detachment or removal of the equipment."

There is not even an iota of doubt in the mind of this Court that the document is of hire purchase agreement.

9. The contention raised by Mr Buch regarding the decree being nullity on the ground of Mahesana Court having no jurisdiction, does not warrant a detailed consideration in light of the fact that the applicant herein has based its right/s on the documents of hire purchase, which as discussed herein above, are executed on required stamp fee. This question has lost its significance because no reliance is placed on the decree passed by the Civil Court and, therefore, no further discussion is warranted.

10. In the result, this Company Application is allowed and the Official Liquidator of M/s. Aryan Finefab Limited is directed to hand over the possession of all equipments/machineries described in para 7 of the application to the applicant-Company.

(Ravi R. Tripathi, J)
zgs/-